Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd v Sunway City Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-(C)(A)-19–01 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
28 NOVEMBER 2018

Arbitration — Challenging arbitration award — Allegation of errors in law — Arbitration Act 2005 ('the AA'), s 42 — Whether 'questions of law' referred to High Court in respect of arbitration award were not questions of law arising out of the award based on full and unqualified acceptance of the findings of facts by the arbitrator — Whether the questions posed were of mixed law and fact which called upon the court to re-examine or re-interpret the facts or application of the law by the arbitrator — Whether the reference was not a proper case falling under s 42 of the AA and should have been dismissed by the High Court on that ground

The respondent had appointed the appellant as the main contractor to carry out a building project. The appellant had, in turn, appointed several subcontractors to carry out various works. Various differences between the parties arose which led to the appellant terminating its contract with the respondent. The dispute on the appellant's claim against the respondent was referred to arbitration. After a lengthy hearing, the arbitrator ruled that the respondent should pay the appellant about RM90.2m for balance value of works done, payments due on interim certificates and the performance bond and for loss of profit while about RM15.2m was payable by the appellant to the respondent for remedial works, latent defects and compensation. The respondent applied to the High Court to set aside the arbitration award under s 42 of the Arbitration Act 2005 ('the AA') on the ground the arbitrator had erred on eight 'questions of law' which substantially affected the rights of the parties. The High Court answered all the questions raised in the respondent's favour and set aside the arbitration award resulting in the instant appeal.

Held, unanimously allowing the appeal, setting aside the order of the High Court and reinstating the arbitrator's award:

(1) By s 8 of the AA, no court shall intervene in matters governed by the AA except where so provided under the Act. One such provision that allowed for the court's intervention was s 42 which stated, inter alia, that any party may refer to the High Court any question of law arising out of an arbitration award which substantially affected the rights of one or more of the parties. In the instant case, the High Court erred in finding that this was a proper case under s 42 of the AA. The 'questions of law' that were

posed did not fall under s 42. All the said questions were not questions of law arising out of the award on 'the basis of full and unqualified acceptance of the findings of fact of the arbitrator'. The questions were of mixed fact and law which called upon the court to either re-examine or re-interpret the facts or application of the law by the arbitrator (see paras 38, 43 & 63).

[Bahasa Malaysia summary

Responden telah melantik perayu sebagai kontraktor utama untuk menjalankan projek pembinaan. Perayu, sebaliknya, telah melantik beberapa subkontraktor untuk menjalankan pelbagai kerja. Beberapa perbezaan timbul antara pihak-pihak yang membawa kepada perayu menamatkan kontraknya dengan responden. Pertikaian berhubung tuntutan perayu terhadap responden telah dirujuk kepada timbang tara. Selepas perbicaraan yang panjang, penimbang tara memutuskan bahawa responden patut membayar perayu sejumlah RM90.2 juta untuk baki nilai kerja yang selesai, bayaran tertunggak untuk perakuan interim dan bon pelaksanaan dan untuk kehilangan keuntungan dan pampasan. Responden memohon kepada Mahkamah Tinggi untuk mengetepikan award penimbang tara di bawah s 42 Akta Timbang Tara 2005 ('AT') atas alasan penimbang tara terkhilaf berhubug lapan 'persoalan undang-undang' yang menjejaskan secara substantif hak pihak-pihak. Mahkamah Tinggi memutuskan semua persoalan yang ditimbulkan itu menyebelahi responden dan mengetepikan award penimbang tara yang menyebabkan rayuan ini.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan mengembalikan award penimbang tara:

(1) Melalui s 8 AT, tiada mahkamah patut campur tangan dalam hal perkara yang dikawal oleh AT kecuali di mana ia diperuntukkan di bawah Akta itu. Salah satu peruntukan sedemikian yang membenarkan campur tangan mahkamah adlaah s 42 yang menyatakan, antara lain, bahawa mana-mana pihak boleh merujuk kepada Mahkamah Tinggi apa-apa persoalan undang-undang yang timbul daripada award timbang tara yang menjejaskan secara substantif hak-hak seorang daripada pihak-pihak itu atau lebih. Dalam kes ini, Mahkamah Tinggi terkhilaf kerana mendapati ini adalah kes yang sesuai di bawah s 42 AT. 'Persoalan undang-undang' yang dikemukakan tidak terjatuh di bawah s 42. Kesemua persoalan tersebut bukan persoalan undang-undang yang timbul daripada award yang 'the basis of full and unqualified acceptance of the findings of fact of the arbitrator'. Persoalan-persoalan tersebut adalah campuran fakta dan undang-undang yang dikemukakan ke hadapan mahkamah untuk sama ada diperiksa semula atau ditafsir semula fakta atau pemakaian undang-undang oleh penimbang tara (lihat perenggan 38, 43 & 63).]

Cases referred to

Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748, SC (refd)

Carrier Lumber Ltd v Joe Martin & Sons Ltd [2003] BCJ No 1602, SC (refd)

Exceljade Sdn Bhd v Bauer (M) Sdn Bhd [2013] MLJU 1202; [2014] 1 AMR 253, HC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (folld)

Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis [1983] 2 All ER 658; [1983] 1 WLR 1469, QBD (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)

Micoperi SrL v Shipowners' Mutual Protection & Indemnity Association (Luxembourg) [2011] EWHC 2686 (Comm), QBD (refd)

MRI Trading AG v Erdenet Mining Corporation LLC [2012] EWHC 1988 (Comm), QBD (refd)

Premium Brands Operating GP Inc v Turner Distribution Systems Ltd [2010] BCJ No 349, SC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 42, 42(1)

Appeal from: Originating Summons No WA-24C(ARB)-33–07 of 2017 (High Court, Kuala Lumpur)

Cyrus Das (Logan Sabapathy, Felix Dorairaj and Alithea Wong with him) (Dorairaj Low & Teh) for the appellant.

Rajendra Navaratnam (Mak Hon Pan and Sachpreetraj Singh Sohanpal with him) (Azman Davidson & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant ('the defendant') against the order of the High Court in allowing the respondent's ('the plaintiff's') application to set aside the arbitration award under s 42 of the Arbitration Act 2005 ('the AA 2005').

[2] We had unanimously allowed the appeal. We now give our reasons.

BACKGROUND FACTS

[3] By a letter of award dated 18 September 2007 ('the LOA'), the defendant was appointed by the plaintiff as the main contractor for the

construction and completion of earthworks, piling and main building works ('the works') of an apartment project known as Palazzion Apartment at Sri Hartamas, Kuala Lumpur.

[4] Following the appointment, parties entered into a written building contract based on PAM form (Private Edition with Quantities) (1998 Edition) with amendments dated 2 March 2009 ('the main contract'). The LOA which forms part of the main contract provides that the works shall be completed by 21 December 2009. Under the main contract, the defendant was liable to pay liquidated and ascertained damages ('LAD') for the delay in completing the works.

[5] The relevant clauses of the main contract are cll 27.2(vi), 27.4, 27.5 and 27.7. Clause 27.2(vi) provides:

> that if the Nominated Sub-Contractor fails to complete the sub-contract works or (where the sub-contract works are to be completed in parts) any part thereof within the period specified or within any extended time granted by the Contractor with the written consent of the Architect, and the Architect certifies in writing to the Contractor that the same ought reasonably so to have been completed, the Nominated Sub-Contractor shall pay or allow to the Contractor either a sum calculated at the rate therein agreed as Liquidated and Ascertained Damages for the period during which the said works, or any part thereof, as the case may be, remain or have remained incomplete or (where no such rate had been agreed) a sum equivalent to any loss and/or damage suffered or incurred by the Contractor and caused by the failure of the Nominated Sub-Contractor aforesaid.

[6] By cl 27.4 of the main contract, the architect may, if it is appropriate to do so, certify for the direct payment by the plaintiff to the nominated subcontractors ('NSCs'), while cl 27.5(i) of the main contract states:

> If any Nominated Sub-Contractor fails to complete the sub-contract works or (where the sub-contract works are to be completed in parts) any part thereof within the time stated in the sub-contract or within any extended time granted by the Contractor, with the written approval of the Architect, then if the same ought reasonably so to have been completed, the Architect shall certify in writing accordingly; immediately upon issue the Architect shall send a duplicate of any such certificate to the Nominated Sub-Contractor.

[7] Pursuant to various LOAs and formal written contracts based upon the PAM Nominated Sub-Contract form (Private Edition with Quantities) (1998 Edition) with amendments, the defendant then appointed NSCs for stone works, timber flooring works, glazing and aluminium works, electrical works, lift installation, fire protection, kitchen cabinets, air conditioning and many others. Under cl 27.7 of the main contract, the contractor shall be fully responsible for any default or breach of contract by all NSCs and that the employer shall in no circumstances be liable to the contractor. The nominated

A subcontracts contain no stipulation on the amount of LAD. The entry for the LAD at the 'Appendix' had been left blank. However, there is cl 7 of the nominated subcontracts for the payment of a sum equivalent to loss or damage suffered by the contractor. Clause 7 reads:

> 7.0 Damages for Non-Completion
>
> 7.1 If the Sub-Contractor fails to complete the Sub-Contract Works or any section thereof within the specified period or an extended period or periods as hereinafter provided, he shall pay or allow to the Contractor a sum equivalent to any loss or damage suffered or incurred by the Contractor and caused by the Sub-Contractor as aforesaid. ...
>
> 7.2 The Contractor shall not be entitled to claim any loss or damage under Clause 7.1 unless the Architect shall have issued to the Contractor ... a certificate in writing stating that in his opinion the Sub-Contract Works or the relevant section thereof ought reasonably to have been completed within the specified period or within any extended period or periods as the case may be.'.

[8] By a supplemental agreement dated 17 July 2009 entered into between the plaintiff and the defendant, ('SA No 1'), the time for completion of the works was revised to 20 April 2010 ('the first revised completion date') without the imposition of any penalty. The defendant however was not able to meet the first revised completion date. By this time, the defendant's liability to pay LAD had arisen under the main contract. The defendant requested the plaintiff not to impose LAD.

[9] The completion date was again revised by a supplemental agreement No 2 dated 19 August 2010 ('SA No 2'). By SA No 2, the plaintiff agreed to extend the completion date to 30 October 2010 ('the second revised completion date'). And the defendant agreed to pay a compensation sum of RM11,600,000 to the plaintiff ('the compensation sum'). The LAD would be imposed if the defendant failed to complete the works after the second revised completion date.

[10] It was the case for the defendant that the NSCs were responsible for the delays. Vide letters dated 12 April 2010 and 2 September 2010, the defendant wrote to the NSCs informing them that they had failed to complete their works on time. By these letters, the defendant had also requested the architect for the project to certify that the particular nominated subcontract works ought reasonably to have been completed pursuant to cl 27.2(vi) of the main contract.

[11] The architect refused to issue a certificate of non-completion ('CNC') pursuant to cl 27.2(vi) of the main contract. The architect took the position that the time for completion of the works by the NSCs had not in fact lapsed,

as it had been revised by the agreement between the plaintiff and the defendant under the first and the second revised completion dates.

[12] Between May 2010–August 2010, the architect issued interim payment certificates ('IPC') Nos 30, 31, 32R and 33 for the amounts of RM8,198,119.19; RM6,786,093.06; RM6,733,728.88 and RM13,707,055.08 respectively. The defendant, in the meantime had not been paying the NSCs.

[13] By a letter dated 3 September 2010, the architect advised the defendant to pay the NSCs the payments that were due within seven days of receipt of payment from the plaintiff, failing which the plaintiff would then exercise its right to make direct payment to the NSCs under cl 27.4 of the main contract.

[14] By a letter dated 7 Seotember 2010, the architect requested the defendant to furnish reasonable proof of payment for IPC Nos 30 and 31 to the NSCs, failing which the architect would issue a certificate pursuant to cl 27.4, which would then enable the plaintiff to make direct payment to the NSCs.

[15] By the architect's letter to the defendant dated 22 September 2010, the architect stated that the defendant had failed to provide the architect with reasonable proof that the defendant had discharged the payments due to the NSCs under IPC Nos 30 and 31. The architect then issued two letters to the plaintiff both dated 23 September 2010 where the plaintiff was advised that it may exercise its rights under cl 27.4 of the main contract to pay the NSCs directly for the amounts due under IPC Nos 30 and 31.

[16] By a letter dated 24 September 2010, the plaintiff informed the defendant that due to the defendant's failure to make payments to the NSCs, the plaintiff would exercise its rights under cl 27.4 of the main contract to make direct payments to the NSCs and that the amounts due as stated by the architect in his letter dated 23 September 2010 would be deducted from IPC No 32R.

[17] On 27 September 2010, the defendant terminated the main contract on the ground that it had not received payment for IPC No 32R. The plaintiff contended that the termination of the main contract by the defendant was wrongful but it nevertheless accepted the termination.

[18] The dispute on the defendant's claim against the plaintiff was referred to arbitration. Pursuant to cl 34 of the main contract, the disputes to be referred to arbitration include disputes on 'any matter or thing left by the Contract to the discretion of the Architect' or 'the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to'. And under

cl 34.4, the arbitrator was given the power to 'to open up, review and revise any certificate, opinion, decision, requirement or notice'.

[19] The plaintiff filed a counterclaim against the defendant for rectification works.

THE ARBITRATION PROCEEDINGS

[20] Having heard twelve witnesses over a 49 days hearing, the learned arbitrator rendered a final award in favour of the defendant/claimant.

[21] From the evidence adduced, including the contemporaneous records in the form of minutes of the site meetings and the progress reports, the arbitrator made, inter alia, the following findings:

(a) that not only was the defendant's work delayed, but also there was significant delay in the works by the NSCs and that the responsibility for the delay in the completion of the works ought to be borne by both the defendant and the NSCs;

(b) that the architect ought to have acted on the defendant's request to issue the CNC to the NSCs;

(c) that in not issuing the CNC pursuant to cl 27.2(vi) of the main contract to the NSCs and in refusing to amend the IPC Nos 31, 32, 32R and 33 (to reflect the deductions for delay compensation) due to the NSCs, the architect had interfered with the defendant's right of recourse against the NSCs;

(d) that the defendant was entitled to recover any loss and/or damage suffered by the failure of the NSCs to complete the subcontract works pursuant to cl 27.2(vi) of the main contract and cl 7 of the nominated subcontracts;

(e) that the NSCs had not obtained an extension of time beyond the first revised completion date;

(f) that the documentary evidence revealed that the defendant maintained its right to seek recourse against the NSCs for the compensation sum;

(g) that it was wrongful for the architect to invoke cl 27.4 of the main contract to effect direct payment to the NSCs given that the NSCs had not obtained extension of time and given the defendant's right of recourse;

(h) that the architect had failed to administer the contract in an independent and impartial manner;

(i) that the plaintiff was in breach of its obligation to honour the IPC within the contractually stipulated period, had delayed a significant number of payments and had underpaid the defendant; and

(j) that the defendant's termination of the main contract was lawful and valid and that payment under IPC No 32R was due when the notice of termination was issued.

[22] The arbitrator awarded the defendant RM90,232,373.55 being the total sum for the following items (inclusive of pre-award interest):

(a) balance value of works executed;

(b) interim certificate Nos 32R and 33;

(c) performance bond; and

(d) loss of profit.

[23] As for the plaintiff, the arbitrator awarded a total sum of RM15,226,608.80 for remedial works, latent defects and compensation inclusive of pre-award interest. The plaintiff's counterclaim for rectification works was dismissed. The arbitrator opined that if the works were indeed defective, the architect ought to have issued a non-conformance report.

[24] Pursuant to the award, the plaintiff thus had to pay the defendant RM75,005,764.75 (inclusive of pre-award interest).

[25] Aggrieved, the plaintiff filed an originating summons in the High Court seeking to set aside in whole or in part and/or to vary the arbitration award pursuant to s 42 of the AA 2005.

PROCEEDINGS IN THE HIGH COURT

[26] The plaintiff contended that the arbitrator's findings/conclusions set out above are legally flawed and that the following questions of law had arisen from the arbitration award, which the plaintiff referred to the High Court as per prayers 5–12 of the originating summons:

> 5. Whether as a matter of law the plaintiff can be held responsible to the defendant for the delays of the nominated sub-contractors, which was the starting point of the arbitrator's chain of reasoning that led to his finding that there was a valid determination of the main contract by the defendant, in the face of cl 27.7 of the main contract in the form of PAM form (Private Edition with Quantities) (1998 Edition) ('*Main Contract*') which provides that the responsibility of the nominated subcontractors lies with the defendant and under no circumstances that the plaintiff could be held liable for the same ('*question of law No 1*')

6. where the parties to a nominated subcontract under the PAM Nominated Sub-Contract form (Private Edition with Quantities) (1998 Edition)

('*nominated subcontracts*') have expressly agreed by amendment thereto, to remove the provision for liquidated and ascertained damages, and/or have not provided for the payment of the same, whether as a matter of law the arbitrator was correct to find that:

(a) the architect is obliged to issue a certificate of non-completion in respect of the NSCs under the main contract, in view of the fact that it would no longer be of any consequence as a condition precedent to the recovery of liquidated damages by the defendant from the nominated subcontractors, and

(b) the non-issuance of the same deprived the main contractor of its recourse against the nominated subcontractor,

which were essential parts of the arbitrator's chain of reasoning that led to his finding that there was a valid determination of the main contract by the defendant ('*question of law No 2*')

7. Whether the arbitrator was right in law in concluding that by reason of the architect's failure to amend certificates 30, 31, 32R and 33 to reflect deductions for delay compensation from payments due to the nominated subcontractors, which under the main contract was only possible if the mechanism for recovery of liquidated damages by the defendant from the NSCs was still operative:

(a) the defendant had lost its right of recourse against the NSCs;

(b) inferring from this and his consequent certificate of direct payment that the architect in this instance had failed to administer the contract in an independent and impartial manner;

(c) consequently, invalidating the architect's certificate of direct payment, and

(d) the defendant's termination of the Main Contract premised upon (a), (b) and (c) was valid. ('*question of law No 3*')

8. Where as in the present case, the nominated subcontracts and main contract were designed to work together, with the architect being the certifier in both, whether as a matter of law the suspension of the extension of time mechanism in the main contract by way of the supplemental agreements entered into by the defendant and the plaintiff, would similarly suspend the extension of time mechanisms in the nominated subcontracts by necessary implication or otherwise ('*question of law No 4*')

9. If so, whether a certificate of non-completion could have been issued by the architect against the main contractor or nominated subcontractors before the period specified for completion of works, as amended by the supplemental agreements, had lapsed. ('*question of law No 5*')

10. Whether as a matter of law the arbitrator was right in holding that the architect lacked impartiality and independence by reason that, inter alia, the architect's professional services agreement contained a stipulation whereby the architect is

required to refer to the plaintiff for comments on all contractual matters ('*question of law No 6*') A

11. Whether the employer's contractual right to make direct payment under the main contract survived the termination of the main contract ('*question of law No 7*')

12. Whether non-conformance reports under the terms of the main contract are the exclusive means of providing defects. In this regard, whether the arbitrator is entitled to consider other evidence apart from the non-conformance reports in determining the existence of defects, liability for the same and/or quantum for rectification works. ('*question of law No 8*') B

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[27] The plaintiff submitted that the arbitrator had committed the following errors of law which justifies the High Court to intervene pursuant to s 42 of the AA 2005:

(a) in failing to recognise that the nominated subcontracts and the main contract were designed to work together and the administration of both the main contract and the nominated subcontracts in respect of the project cannot be treated separately and independently. The SA No 1 and SA No 2 by way of necessary implication apply to the nominated subcontracts as well (questions 4 and 5); D

E

(b) in failing to appreciate that as a matter of law, the defendant has no recourse to LAD under the nominated subcontracts by reason that the provision of LAD in the nominated subcontracts had been deliberately struck out or left empty, which means in law, the defendant is precluded from recovering any LAD from the NSCs (questions 2 and 3); F

(c) in failing to appreciate the proper division of risk between the plaintiff and the defendant ie that the main contract provides that the defendant is responsible for the NSCs. The acts or breaches of the NSCs cannot be used to justify the determination of the main contract as that would tantamount to rewriting the main contract to hold the plaintiff responsible for the NSCs (question 1); G

(d) in concluding that the architect lacked impartiality and independence for the reason that the architect was required to refer all contractual matters to the plaintiff for comments (question 6); H

(e) in failing to appreciate that the plaintiff's contractual right to make direct payments under the main contract does not survive the determination of the main contract (question 7); and

(f) in failing to appreciate that the non-conformance reports are not the exclusive means of proving defects (question 8). I

[28] The learned judge agreed with the plaintiff on all counts. Her Ladyship held that the questions of law referred to by the plaintiff fell within the ambit

of s 42 of the AA 2005 as they are questions of law that arise from the award and which substantially affect the rights of the parties.

[29] The plaintiff's application was thus allowed and the award was set aside. The matter was remitted to the arbitrator for reconsideration of the same with the learned judge's determination on the questions of law. However, we noted that at the point when Her Ladyship delivered her decision allowing the plaintiff's application, she did not specifically answer any of the questions referred. It was only in her subsequent grounds of judgment that she answered all the questions posed.

[30] On the first error submitted by the plaintiff, the learned judge ruled that if the main contract had been given an extended time line, the same must equally apply to the nominated subcontracts. The learned judge therefore answered question 4 in the positive and question 5 in the negative.

[31] The second error of law relates to questions 2 and 3. The learned judge found that the arbitrator had failed to appreciate that the defendant had no right of recourse for LAD from the NSCs because the provision relating to LAD in the nominated subcontracts had been deliberately struck out and/or left empty. This, according to the learned judge showed the intention of the parties that the LAD provision shall not apply. Consequently, the learned judge held that there was no necessity for the architect to issue the CNC, and that the arbitrator erred in law in his interpretation of the provision on LAD in the nominated subcontracts. Questions 2 and 3 were thus answered in the negative.

[32] On the third error of law which relates to question 1, the learned judge held that the arbitrator's finding that the defendant was justified in determining the main contract by relying on the NSCs' delay and the non-issuance of the CNC by the architect, was contrary to cl 27.7 of the main contract, which provides that the defendant is wholly responsible for the actions of the NSCs, including the issue of delay. The arbitrator had therefore misinterpreted cl 27.7 of the main contract. Her Ladyship answered question 1 in the negative.

[33] In respect of the fourth error of law, the learned judge found that in concluding that there was unfairness on the part of the contract administrator, the arbitrator had failed to give a correct interpretation with regards to the architect's professional services agreement.

[34] The learned judge further found that the arbitrator had made an error of law in his conclusion that the plaintiff ought to have made actual payment to the NSCs, notwithstanding that the main contract had been determined. In

this regard, the learned judge agreed with the plaintiff that the direct payment based on cl 27.4 of the main contract did not survive the termination of the main contract. Question 7 was thus answered in the negative.

[35] The learned judge also proceeded to consider the error of law in relation to question 8, although question 8 had been abandoned by the parties.

[36] Dissatisfied with the learned judge's decision, the defendant appealed to this court.

[37] In gist, the defendant submitted that the application by the plaintiff was unsustainable under s 42 of the AA 2005; that the learned judge failed to specifically address and answer the questions posed and that the questions posed were fact sensitive and that there was a failure by the High Court to accept the critical findings of fact by the arbitrator.

OUR DECISION

[38] By s 8 of the AA 2005, no court shall intervene in matters governed by the AA 2005 except where so provided in the Act. One such provision which allows for the court's intervention is s 42 which states:

> 42 Reference on questions of law.
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> (1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.
>
> (2) ...
>
> (3) ...
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> (4) The High Court may, on the determination of a reference —
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> (a) confirm the award;
>
> (b) vary the award;
>
> (c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or
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> (d) set aside the award, in whole or in part.
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> (5) ...
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> (6) ...
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> (7) ...
>
> (8) ...

[39] The application of s 42 has been elucidated in many authorities. In *Exceljade Sdn Bhd v Bauer (M) Sdn Bhd* [2013] MLJU 1202; [2014] 1 AMR 253, Nallini J (as she then was) considered the approach to be adopted by the court in a s 42 application. Her Ladyship referred to the decision of Mustil J in *Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis* [1983] 1 WLR 1469 where at para [17] of her judgment she said:

> [17] Mustil J then goes on to consider the proper test or approach to be adopted by a court determining the substantive appeal which turns on a question of law arising out of the arbitration:
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> > ... Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) The arbitrator ascertain the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In light of the facts and the law as ascertained, the arbitrator reaches his decision.
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> In some case, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In some instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts would lead inevitably to one answer, whereas the arbitrator has arrived another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principle which he has stated.

[40] In a more recent decision of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693, Jeffrey Tan FCJ sets out the test under s 42 as follows:

> [117] Under s 42(1), any party may refer to the High Court 'any question of law arising out of an award'. And under s 42(1A), 'The High Court shall dismiss a reference made under sub-s (1) unless the question of law substantially affect the rights of one or more of the parties'. The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.

> [118] An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters when there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable and the like are not tests for the setting aside of an award. The so- called guidelines (g) 'This jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases'; (h) 'Nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable'; and (j) 'While the findings of fact and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse', stated in *Perwira Bintang* are not in line with s 42 and should not be followed.

[41] On what is a question of law in the context of s 42, the Federal Court referred to, inter alia, the following cases: *Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis* [1983] 2 All ER 658; *Micoperi SrL v Shipowners' Mutual Protection & Indemnity Association (Luxembourg)* [2011] EWHC 2686 (Comm); *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm); *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748; *Carrier Lumber Ltd v Joe Martin & Sons Ltd* [2003] BCJ No 1602; *Premium Brands Operating GP Inc v Turner Distribution Systems Ltd* [2010] BCJ No 349; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743 and concluded as follows:

> [150] ... Nonetheless, from our survey of the authorities, we would conclude that one of the following, which is not an exhaustive list, would meet the paradigm of 'any question of law' in s 42:
>
> (a) a question of law in relation to matters falling within (2) of Mustill J's three stage test;
>
> (b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);
>
> (c) a question as to whether there was an error of law, and not an error of fact (*Misoperi*); error of law in the sense of an erroneous application of law;
>
> (d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal had given another (*MRI Trading*);
>
> (e) a question as to the correctness of the law applied;
>
> (f) a question as to the correctness of the tests applied (*Canada v Southam*);
>
> (g) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*);
>
> (h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premium Brands*); this may also come under s 37 of the AA 2005; and
>
> (i) a question of construction of document (*Intelek*).

[42] The Federal Court went on to state:

> [153] Where it is a question of fact, 'The arbitrators (remain) the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of financial correspondences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact' (*The 'Beleares'* at p 228) '... on findings of facts an arbitrator is the sole judge. ...
>
> ...
>
> [157] The scope of the words 'arising out of an award' in s 42 was first enunciated in *Majlis Amanah Rakyat v Kausar Corp, citing Universal Petroleum Co v Handels und Transport GmbH* [1987] 1 WLR 1178, where Mohamad Ariff J, as he then was, said that 'A question of law must arise out of an award and not out of the arbitration' (followed by *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 10 MLJ 453; [2012] 7 CLJ 540, *Sanlaiman* and *Tune Insurance*; see also *The Arbitration Act 2005* at pp 200–201).

[43] Reverting to the instant appeal, and applying the principles as set out in *Far East Holdings Bhd*, we found that all the questions referred are not questions of law arising out of the award on 'the basis of full and unqualified acceptance of the findings of fact of the arbitrator'. The questions are of mixed fact and law which called upon the court to either re-examine or re-interpret the facts or application of the law by the arbitrator.

[44] Question No 1 pertained to the issue of who bears the responsibility of the NSCs. The plaintiff contended that the arbitrator's decision in concluding that the determination of the contract by the defendant was valid by reason that the architect had failed to issue CNC to the NSCs in effect had rendered the plaintiff responsible for the NSCs. As a matter of fact, and consonant with cl 27.7 of the main contract which stipulates that the plaintiff shall not be liable for the NSCs, the arbitrator did not find that the plaintiff was responsible for the NSCs. That the plaintiff was found responsible for the NSCs was the conclusion made by the learned judge as evident by para 54 of her grounds of judgment:

> Third error of law — Question 1
>
> [54] On this issue, the arbitrator made a finding that the defendant was entitled to determine the main contract because he finds that the NSCs were also responsible for the delay. The arbitrator has held that the defendant was justified in determining the main contract by relying on the NSCs' delay and the non-issuance of the CNC

by the Architect to the NSCs. *This simply means that the plaintiff as the employer is held responsible for the delays of the NSCs*. (Emphasis added.)

[45] Question No 1 did not therefore arise out of the arbitration award and it cannot form the basis of a question of law to be entertained by the court under s 42.

[46] In any event, based on oral and documentary evidence, the arbitrator had made a specific finding of fact that the delay in the works were attributable to both the defendant and the NSCs. The arbitrator also found that it was not disputed that both the defendant and the NSCs contributed to the delays of the works. Flowing from this undisputed fact, the architect should have issued the CNC when asked to do so by the defendant. The arbitrator made a further finding of fact that the architect failed to comply with cl 27.5 of the main contract and that this failure by the architect interfered with the defendant's right of recourse against the NSCs.

[47] In respect of question 2, the learned judge accepted the plaintiff's contention that the defendant and the NSCs had expressly agreed that any contractual right to LAD in the event of delay for the completion of the works was rendered inoperative by the deletion or non-entry of any terms on LAD in the appendix in the nominated subcontracts. Consequently, the architect is not obliged, as a matter of law, to issue a CNC in respect of the NSCs under the main contract, in view of the fact that it would be of no consequence. The arbitrator therefore fell into error in concluding that the defendant had lost its valid contractual right of recourse for loss and damage against the NSCs pursuant to cl 27.2(vi) of the main contract due to the non-issuance of the CNC by the architect.

[48] On the issue of absence of the provision for LAD, we found that the arbitrator had specifically referred to cl 27.2(vi) of the main contract and cl 7 of the nominated subcontracts, where both these clauses provide for loss and/or damage for non-completion.

[49] It was not disputed that the defendant had to pay RM11,600,000 as compensation sum to the plaintiff for the extension of time. The arbitrator made a finding of fact that the compensation sum of RM11,600,000 was a consideration for the second revised completion date which was undertaken outside the contractual mechanism for extension of time. Based on the documentary evidence, the arbitrator had also made a finding of fact that the defendant had maintained its right to seek recourse against the NSCs in the form of apportionment of the compensation sum. There was no interpretation of the provision for LAD by the arbitrator.

[50] In respect of questions 3 and 4, the learned judge held that the arbitrator had made an error of law in failing to interpret that both supplemental agreements apply to the nominated subcontract because both the main contract and the nominated subcontract were designed to work together. Therefore, if the main works had been given extension, by necessary implication the extension must equally apply to the nominated subcontracts.

[51] Again, these were not questions of law arising out of the award, but arising out of the assumption of facts implied by the learned judge which facts were not found by the arbitrator.

[52] Question 3 purports to state that the termination by the defendant was on the grounds that the architect was obliged in law to issue the CNC to the NSCs; that the defendant has a right of recourse against the NSCs and that the architect was wrong to issue the certificate of direct payment. It relates to the factual findings of the arbitrator that the architect's failure to issue the CNC frustrated the defendant's recourse against the NSCs as without the said CNC neither damages can be claimed nor amendments to the certificates, can be made. Be that as it may, the determination of the main contract by the defendant as can be seen from the award was made pursuant to cl 26.1 for non-payment and not on the grounds set out by the plaintiff in question 3(d).

[53] In so far as question 4 is concerned, it was premised on a disputed interpretation of facts relating to the SAs and the understanding of the recourse that the defendant had against the NSCs. The question was framed premised on the necessary implication drawn by the plaintiff and accepted by the learned judge that the extension of time granted to the defendant must equally apply to the NSCs.

[54] With respect, the learned judge, upon re-assessment of that disputed interpretation of facts, was not entitled to come to an opposite conclusion from what was reached by the arbitrator. Neither was the learned judge seized with the jurisdiction to draw her own inferences from the facts before the arbitrator nor can Her Ladyship find an implication that was factually rejected by the arbitrator. More so, when as highlighted by the affidavit evidence of the defendant in the High Court, the architect and the quantity surveyor (who had testified in the arbitration) had themselves recognised in the arbitration that the purchased extension of time under SA No 2 did not automatically extend to the NSCs.

[55] On question 5, the learned judge held that the arbitrator erred in law in concluding that a CNC ought to have been issued by the architect against the

NSCs pursuant to cl 27.2(vi) when requested by the defendant as the architect could not have issued the CNC by reason that time for completion had not lapsed.

[56] Question 5 likewise was not a question of law arising out of the award. It was a hypothetical question premised on the learned judge re-examining the effect of the SAs. With respect, it was not open to the learned judge to entertain questions grounded on disputed facts or varying legal interpretation that could be given to those facts. As stated by the Federal Court in *Far East Holdings Bhd*, the plaintiff could not refer questions of law that were wholly reliant on a reversal of facts found by the arbitrator. It is also pertinent to note that cl 8 of the nominated subcontract provides for extension of time but this clause, as the evidence revealed, was not availed by the NSC.

[57] Question 6 was in relation to the issue of the architect's impartiality and independence. The plaintiff contended that the arbitrator had erred in law in finding that the architect lacks impartiality and independence by reason, inter alia, that the architect's professional services agreement contains a stipulation whereby the architect is required to refer to the plaintiff for comments on all contractual matters.

[58] While the arbitrator took cognisance of the fact that the architect's professional services agreement with the plaintiff contains a stipulation for the architect to refer to the plaintiff for comments on all contractual matters, it was the architect's failure to comply with cl 27.5 of the main contract and how the main contract was administered by the architect that triggered the finding of partiality. The finding was made consequent upon the arbitrator's finding that critical nominated subcontract works had been delayed, thereby causing overall delay of the completion of the works. The architect having known that the NSCs had not obtained an extension of time and having known that the defendant would have recourse to recover from the NSCs the loss and damage suffered for the delay, ought to have acted on the defendant's request for the issuance of CNC.

[59] The arbitrator made a specific finding of fact that the architect was partial based on his assessment of both the oral and documentary evidence. Again we found that this was a mixed question of law and fact, requiring the court to re-examine the correctness of the architect's actions and the consequence of those actions on the defendant's right of recourse, which question did not fall under s 42 of the AA 2005.

[60] On question 7, the plaintiff argued that the arbitrator erred in law in holding that the plaintiff's invocation of cl 27.4 of the main contract was invalid as no actual payment was made to the NSCs. In this regard, the plaintiff

asserted that upon determination of the contract, the plaintiff could no longer validly proceed with the direct payment of sums due under IPC No 32R to the NSCs.

[61] As regards direct payment by the plaintiff, on 22 September 2010 the architect issued the certificate, followed by a letter dated 23 September 2010 where the architect advised the plaintiff to make direct payment to the NSCs. It was a fact that payment under IPC No 32R was not made to the NSCs but was placed by the plaintiff into an escrow account. The arbitrator made a finding that by cl 27.4 of the main contract, actual payment had to be made and that without actual payment to either the defendant or the NSCs, the plaintiff had obviously not honoured the IPC No 32R. Further, given his earlier determination that the architect had wrongly effected the direct payment mechanism, the defendant was entitled to full payment of IPC No 32R.

[62] We were of the view that question 7 likewise was not a question arising out of the award.

CONCLUSION

[63] In light of all the above, we were unanimous in our decision that the learned judge erred in finding that this was a proper case under s 42. The questions posed do not fall under s 42. On the ground that the tests under s 42(1) of the AA 2005 have not been met, we allowed the appeal with costs. We set aside the order of the High Court and we reinstated the arbitrator's award.

Appeal allowed unanimously; order of the High Court set aside and the arbitrator's award reinstated.

Reported by Ashok Kumar